Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1437

PHILIP PELTZ,

Petitioner,

v.

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a writ of certiorari issue to review the judgment of

the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, which disbarred petitioner from the practice of law. The New York Court of Appeals denied leave to appeal.

OPINIONS BELOW

The judgment appealed from is appended hereto at pp. 3a-7a; it is reported at *___AD2d___, ___NYS2d___ (App Div 2d Dep't, December 8, 1977), lv to appeal den. 43 NY2d 646, ___NE2d___.

JURISDICTION

The judgment sought to be reviewed was entered December 8, 1977; leave to

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*Not available at press time.

appeal to the Court of Appeals of the State of New York was denied by order entered January 18, 1978. There was no order respecting a rehearing or an extension of time in which to petition for certiorari. Jurisdiction to review the judgment by writ of certiorari is conferred by 28 U.S.C. 1257 (3), and Spevack v. Klein, 385 US 511, 17 L ed 2d 574, 87 S Ct 625; Cummings v. Missouri, 71 US 277, 18 L ed 356; Matter of Garland, 71 US 333, 19 L ed 366.

QUESTIONS PRESENTED

Does the retroactive application of a newly-enunciated court decision providing for automatic disbarment of an attorney convicted of a federal felony with only a State misdemeanor counterpart constitute an ex post facto

law and bill of attainder in violation of Art. I § 10, and of the 14th, 5th and 6th Amendments, when automatic disbarment was not mandated, at the time of the occurrence, conviction or the favorable referee's report of a disciplinary hearing and which report was before the disciplining court at the time that newly-enunciated doctrine was retroactively applied to him?

Is the institution by a State of disciplinary proceedings based on petitioner's conviction of a federal felony which took place six and a half years prior violative of the requirements of procedural due process and of the 14th, 5th and 6th Amendments and Art. I § 10 of the U.S. Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitution of the United States

ART. I § 10 CL. 1

SECTION 10

[1] No State shall enter into any Treaty, Alliance, or Confederaion; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 14

(Adopted July 28, 1868)

SECTION 1

All persons born or naturalized in the United

States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEW YORK JUDICIARY LAW § 90(4)
McKinneys Laws, Vol. 29, p. 120

§ 90. Admission to and removal from practice by appellate division; character committees.—/

4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.

Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys.

STATEMENT OF THE CASE

The statement of the case can best be set forth by a chronology of the pertinent events as follows:

1966

January 1-April 6, 1966

Petitioner engages in activities leading to indictment. *(AD 2 pp. 3-7; 28a-34a)

1969

April 7, 1969

Petitioner indicted for violation of various sections of Title 15 and Title 18 USC and regulations of Securities & Exchange Commission (AD 2 pp. 3-7; 28a-34a) Southern District of New York.

1970

January 9, 1970

Petitioner convicted and sentenced after

*Record references (AD) are to Appellate Division subpoena record document numbers and page. Record references (CA) are to Court of Appeals document numbers and page. References to pages followed by "a" are the collateral references in the appendix. Thus AD 6 pp. ; 28a-34a refers to Appellate Division document 6, pages__to __ which appear at the appendix pages 28a-34a.

jury trial of use of the mails to effect short sales of certain stock and other counts as set forth at AD 6 p. 2; 12a.

1976

July 9, 1976

Respondent petitions court below for institution of disciplinary proceedings, based upon the conviction (AD 2 pp. 1-7; 25a-37a).

1977

July 1, 1977

Referee, Retired Justice of New York Supreme Court, after hearings submits report to Court below observing that "***An array of witnesses have testified --judges and justices of the Civil and Supreme Courts, lawyers and laymen who speak of him in the highest terms as to his reputation, integrity, dedication to the legal profession. *** 3. I find that he is

a completely rehabilitated person, fully conscious of his social and professional responsibilities. ***** 6. I further find that he is presently fit to continue the responsibilities incident to the practice of law." (AD 6 pp. 8-10; 21a, 23a-24a)

October 13, 1977

New York Court of Appeals decides Matter of Chu, 43 NY2d 490, NE2d .

December 8, 1977

Supreme Court, Appellate Division, Second Judicial Department, relying on Matter of Chu, and interpreting it as requiring automatic disbarment of attorneys convicted of federal felonies, applies it retroactively and disbars Petitioner automatically by the order appealed from. (AD 1 p. 2; 6a)

1978

January 18, 1978

Court of Appeals of State of New York denies Leave to Appeal. (CA 1, p. 1; 1a-2a)

Petitioner has raised the objections that retroactive application of Matter of Chu, supra, constituted an ex post facto law and a bill of attainder in his motion for leave to appeal to the Court of Appeals. (CA 4 pp. 18-29) The failure to provide a speedy trial violated petitioner's constitutional rights was urged in Supreme Court, Appellate Division, Second Department in petitioner's brief dated July 22, 1977. (AD 16 pp. 8-15)

REASONS FOR ALLOWANCE OF THE WRIT

The writ should be granted by virtue

of Rule 19(a) of this Court in that a State court has decided a federal question of substance in a way not in accord with applicable decisions of this Court, and that retroactive application of a newly enunciated self-executing forfeiture of profession constitutes State passage of a bill of attainder and ex post facto law. Art. I § 10 U.S. Constitution.

This Court will grant certiorari in a case of State disbarment. Spevack v. Klein, 385 US 511, 17 L ed 2d 574, 87 S Ct 625. In Matter of Ruffalo, 390 US 544, 550, 20 L ed 2d 117, 88 S Ct 625, this Court held that Federal disbarment of a State disbarred attorney is designed to protect the public and is a punishment or penalty imposed on the lawyer and that he is accordingly entitled to procedural due process. See also: Selling v. Radford, 243 US 56, 61 L ed 585, and Theard v. U.S., 354 US 278, 1 L ed 2d 1342,

77 S Ct 1274. These cases all held that State disbarment did not a fortiorari require automatic disbarment by federal courts. Selling set forth the standards to be applied in federal disbarment, as follows, at 43 US 56, 61:

> **These principles are that a federal court should recognize the want of a fair private and professional character in a member of the bar of the court inherently arising as the result of the disbarment in the state court, unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: (1) that the state procedure, from want of notice or opportunity to be heard, was wanting in due process; (2) that there was such an infirmity of proof as to facts found to have estabished the want of fair private and professional character as to give rise to a clear conviction on the part of the federal court that it could not, consistently with its duty, accept as final the conclusion on that subject; or (3) that some other grave reason existed which should convince the federal court that to allow the natural consequences of the state court judgment to have their effect would conflict with the federal court's duty not to disbar except upon the conviction that, under the principles of right and justice, it was constrained so to do."**

Due process of law, proof as to facts found to have established the want of fair private and professional character and

principles of right and justice are the three elements to be considered.

In Spevack, supra, this Court reversed the State disbarment as a violation of due process of law and violation of federal constitutional rights. The case stands for the proposition that this Court may act as a reviewing court in State disbarment cases. The Writ should be allowed because petitioner's disbarment 1) is a penalty imposed 2) in violation of due process under Art. I § 10 and the 14th, 6th and 5th Amendments and 3) does not protect the public.

In Ruffalo, supra, the court observed at 390 US at 550:

> ***** Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. Ex parte Garland, 4 Wall 333, 380, 18 L ed 366, 369; Spevack v Klein, 385 US 511, 515, 17 L ed 2d 574, 577, 87 S Ct 625. He is accordingly entitled to procedural due process, *****

The disbarment of petitioner does not protect the public. The referee's report after observing that "***An array of witnesses have testified--judges and justices of the Civil and Supreme Courts, lawyers and laymen who speak of him in the highest terms as to his reputation, integrity, dedication to the legal profession. ***" (AD 6 pp. 8-10; 21a) concludes that "***3. I find that he is a completely rehabilitated person, fully conscious of his social and professional responsibilities **** 6. I further find that he is presently fit to continue the responsibilities incident to the practice of law. ***" (AD 6 pp. 8-10; 23a-24a)

This report was received by the Appellate Division, Second Department of the New York Supreme Court on July 1, 1977. On October 13, 1977, the New York Court of

Appeals decided Matter of Chu, 42 NY2d 490, ___NE2d___. Because of an interpretation of the Chu case imposed by the Second Department that any conviction of a federal felony requires automatic dismissal, the court disregarded the disciplinary proceeding and issued an Order disbarring petitioner by retroactive application. Prior to Chu disbarment was not automatic because petitioner's acts did not constitute a State felony.

Petitioner's disbarment was founded on the retroactive application of the Chu case, supra, and Judiciary Law § 90(4) as interpreted thereby. Prior to Chu, at the time of petitioner's acts of misconduct some ten years earlier, at the time of petitioner's conviction some six and a half years earlier, and during the entire time of the disciplinary hearing, the section was self-executing only if the

federal felony conviction had an equivalent State felony designation for the same acts. Re Donegan, 282 NY 285, 26 NE 2d 260; Re Keogh, 25 AD2d 499, 267 NYS2d 87.

Chu sets the development of the section as being parallel to the predicate felony concept in State multiple offender sentencing procedures. Chu observes that the purpose of disbarment is not to punish the attorney but to protect the public. Here, because of the unconscionable delay in proceeding against petitioner and the retroactive application of Chu after the hearing, the attorney has been punished and there is no relevance, according to the Referee's report, to protection of the public. This result is ever so when punitive statutes leading to loss of profession are viewed as self-executing without a due process hearing. Cf. Gardner v. Murphy, 46

Misc. 2d 728, 260 NYS2d 739; Slochower v. Bd of Ed, 350 US 551, 100 L ed 692, 76 S Ct 637; Wieman v. Updegraff, 344 US 183, 97 L ed 216, 73 S Ct 215.

The retroactive application of Chu to petitioner had no relevance to the necessities of protecting the public, and prejudice was wrought by failure on the part of the Grievance Committee to accord petitioner the basic due process requirement of a speedy hearing. The charges of misconduct were lodged against petitioner on July 9, 1976, some six and one half years after the conviction and sentence of January 9, 1970 (AD 1, p. 1; 3a) and approximately ten years after acts of misconduct took place. The New York authorities were notified of the conviction by the United States Attorney for the Southern District of New York (AD 14,

p. 5) and the conviction was reported officially. U.S. v. Peltz, 433 F2d 48 (2d Cir.), cert. den. 401 US 955, 28 L ed 2d 238, 91 S Ct 974. Moreover, it was fully reported in the New York Law Journal, the official notice paper of the New York Court.

During the intervening years, the New York authorities did nothing, and petitioner continued to practice law in a most exemplary manner.

This retroactive application gave rise to a prohibited ex post facto law and a bill of attainder, a position which was urged below by petitioner (CA 4, pp. 18-29). An attorney may not be automatically disbarred upon acts or events, which, at the time of such action, were not grounds for automatic disbarment. U.S. Constitution Art. I § 10. In Matter of Garland, 71 US 333, 19 L ed 366, the court

held that the ex post facto application of newly enunciated policy to past acts which were not acts of misconduct when done amounts to the passage of a bill of attainder. See Cummings v. Missouri, 71 US 277, 18 L ed 356. If a legislature may not pass a bill of attainder and ex post facto law, the courts may not. Bouie v. City of Columbia, 378 US 347, 12 L ed 2d 894, 84 S Ct 1697.

Evidence of practices of our past several national administrations has revealed attempts at retaliatory use of the IRS and SEC to harass and indict political opponents to achieve political ends. The intricacies of the various securities and revenue acts which involve full-time study and attention contain many felony provisions for violations of a technical nature. These often lead to convictions where scienter was not pronounced or

was lacking. N.Y. Judiciary Law § 90(4) and sister State similar disbarment statutes should not be viewed as self-executing but should accord the offender a due process hearing prior to loss of profession. In New York, a conviction for acts constituting misdemeanors does not lead to automatic disbarment. These same acts, federally prosecuted and designated felonies, also should not lead to automatic disbarment under equal protection of the laws concepts. Cf. DaGrossa v. Goodman, 72 Misc. 2d 806, 339 NYS2d 502.

Procedural due process was also violated by failure to accord petitioner a speedy hearing after his conviction. Reaching back over the years with Chu demonstrated the prejudice which is always visited upon deprivation of a speedy trial. Such deprivation often renders the result irrelevant to

the situation and is the reason a speedy trial is part of procedural due process. At the late date of the disciplinary hearing, petitioner fared well and was found after the adversary hearing to be substantively qualified to continue the practice of law by the Referee. Then, respondents by virtue of Chu changed the theory seeking disbarment under circumstances reminiscent of Ruffalo, supra, wherein after the disciplinary hearing was underway the attorney was served with additional or different charges arising during the course of the hearing. The Court below placed procedure over substance.

Procedural due process must have some relevance to the complained of actions and the result. Thus in Theard, supra, this Court held, using the criterion of Selling, supra, that "principles of right and justice"

would be violated to disbar from federal practice an attorney who, 18 years before the State disbarment, had committed an act of misconduct, but since then had been a creditable member of the bar. In this case, petitioner had committed the act of misconduct some ten years before he was served with the disciplinary papers herein, although those acts and conviction were fully reported in official reports. The intervening years have shown that the penalty of disbarment did not protect the public and the "principles of right and justice" require remedial action sought by this writ application.

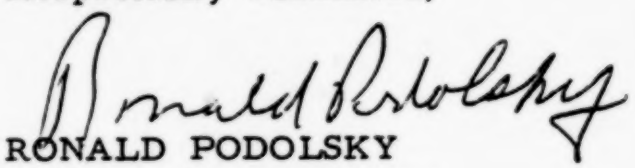
Further, this is a case of nationwide significance as it involves questions of ex post facto, bill of attainder and violation of procedural due process as relates to the practice of a profession, all in violation of

the United States Constitution.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the procedures of disbarment in the Court below.

Respectfully submitted,



RONALD PODOLSKY
Attorney for Petitioner

APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Eighteenth day of January A.D. 1978.

PRESENT, HON. CHARLES D. BREITEL, Chief Judge, presiding.

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2 Mo. No. 15 A & B
In the Matter of
Philip Peltz, an Attorney and Counselor at Law.
Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts,
Respondent,
Philip Peltz,
Appellant.

A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having heretofore been made upon the part of the appellant herein, and a cross-motion to dismiss appellant's appeal taken as of right having heretofore been made upon the part of the respondent herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said cross-motion to dismiss the appeal taken as of right be and the same hereby is granted and the appeal dismissed, without costs, upon the ground it does not lie as of right; and it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied; and it is

ORDERED, that the said motion for a stay be and the same hereby is dismissed as academic.

/s/ Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 8, 1977.

HON. FRANK A. GULOTTA, Presiding Justice,
HON. JAMES D. HOPKINS,
HON. HENRY J. LATHAM,
HON. JOHN P. COHALAN, JR.,
HON. CHARLES MARGETT. Associate Justices

In the Matter of Philip Peltz, an attorney and counselor-at-law.	
Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts, Petitioner;	Order of Disbarment
Philip Peltz, Respondent.	

A disciplinary proceeding having been instituted in this court upon the petition of the Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts, verified July 9, 1976, in respect to Philip Peltz, an attorney and counselor-at-law, admitted to practice by this court on June 18, 1958; the petition

praying that the respondent be disciplined for professional misconduct upon the charges therein set forth; the respondent having filed an answer thereto, dated August 12, 1976; and this court, by an order dated September 17, 1976, having referred the issues raised by the petition and the answer to the HON. ARTHUR S. HIRSCH, a Justice of the Supreme Court, to hear and report, with his findings upon each of the issues; thereafter, this court, by an order dated October 29, 1976, having relieved the said HON. ARTHUR S. HIRSCH of such designation and having referred the said issues to the HON. SIMON J. LIEBOWITZ, a Retired Justice of the Supreme Court, as Referee, to hear and to report, together with his findings on the said issues; thereafter, the said HON. SIMON J. LIEBOWITZ having held hearings and filed his report with this court on July 1, 1977 together with a transcript of the hearings and the exhibits; thereafter, the petitioner having moved, by a notice of motion dated July 11, 1977, to confirm the said Referee's report, with an affidavit by Edward H. Albert, Esq., and the respondent, by Edward J. Connolly, Esq., having submitted an affirmation in support of the petitioner's said motion; thereafter, pursuant to leave granted, the petitioner served and filed a supplemental petition herein; and the respondent filed an answer thereto; and this court, by an order dated October 7, 1977, having referred the issues raised by the supplemental petition and answer to HON. HARRY GITTLESON, a Retired Justice of the Supreme Court, to hear and to report, with his findings upon each of the issues; and the petitioner

having moved, by a notice of motion dated October 20, 1977, (1) to vacate this court's said order dated October 7, 1977 which referred the issues raised by the supplemental petition and answer to HON. HARRY GITTLESON, on the grounds that the respondent has been automatically disbarred by reason of his conviction and sentence of a felony in the United States District Court for the Southern District of New York on January 9, 1970 (the said conviction being the basis for the commencement of the proceeding against respondent upon the petition verified July 9, 1976) and (2) to strike the respondent's name from the roll of attorneys by reason of the said conviction and the respondent having cross moved, by a notice of cross motion dated November 3, 1977 to (1) vacate the said order of reference of October 7, 1977, (2) confirm the Referee's report on two previously conducted hearings on the original petition to discipline the respondent, (3) limit the sanctions imposed on the respondent to a private censure and (4) deny petitioner's motion insofar as it calls for the disbarment and striking of respondent's name from the roll of attorneys;

Now, on reading and filing the said notice of motion and the affidavit of Nicholas C. Cooper and petitioner's memorandum of law in support of the said motion; and the affirmation of Edward J. Connolly and respondent's brief in opposition to petitioner's motion and in support of respondent's cross motion; and upon all the papers filed herein; and Nicholas C. Cooper, Esq., having appeared

of counsel for the petitioner and Edward J. Gallagher, Esq., having appeared of counsel for the respondent, due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is unanimously

ORDERED that the petitioner's motion is hereby granted, and it is further

ORDERED that this court's said order of October 7, 1977 is hereby recalled and vacated, and it is further

ORDERED that, effective December 8, 1977, the respondent Philip Peltz is hereby disbarred, and his name is hereby directed to be struck from the Roll of Attorneys and Counselors-at-Law (Matter of Chu, 42 NY2d 490 [decided October 13, 1977]), and it is further

ORDERED that the respondent's cross motion is hereby granted only to the extent of recalling and vacating the said order of October 7, 1977, and in all other respects, the said cross motion is denied, and it is further

ORDERED that, pursuant to Statute (Judiciary Law, § 90), the said PHILIP PELTZ is hereby commanded to desist and refrain: (1) from the practice of the law in any form, either as principal, or as agent, clerk or employee of another; (2) from appearing as an attorney or counselor-at-law before any judge, justice, board, commission or other public authority; (3) from giving another an opinion

as to the law or its application or and advice in relation thereto; and (4) from holding himself out in any was [sic] as an attorney and counselor-at-law, and it is further

ORDERED and DIRECTED that the said PHILIP PELTZ shall comply with this court's rules governing the conduct of disbarred, suspended or resigned attorneys - a copy of such rules being annexed hereto and made a part hereof.

Enter:

/s/ IRVING N. SELKIN

Clerk of the Appellate Division.

DEC 8- 1977

In the Matter of Philip Peltz,
an attorney and counselor-at-law.

Joint Bar Association Grievance
Committee for the Second and
Eleventh Judicial Districts,
petitioner;

Philip Peltz, respondent.

No. 5765

Motion by petitioner (1) to vacate order of this court dated October 7, 1977 which referred the issues raised by the supplemental petition and answer in the proceeding to the Hon. HARRY GITTLESON to hear and to report, on the grounds that the respondent has been automatically disbarred by reason of his conviction and sentence of a felony in the United States District Court for the Southern District of New York, on January 9, 1970 and (2) to strike respondent's name from the roll of attorneys by reason of said conviction.

No. 5843

Cross motion by respondent (1) to vacate the order of reference of October 7, 1977, (2) confirm the Referee's report on two previously conducted hearings on the original petition to discipline the respondent, (3) limit the sanctions imposed on the respondent to a private censure and (4) deny petitioner's motion insofar as it calls for the disbarment and striking of respondent's name from the roll of attorneys.

Motion of petitioner granted. The order of October 7, 1977 is recalled and vacated. The respondent is disbarred. The clerk of this court is directed to strike his name from the roll of attorneys and counselors-at-law, forthwith (Matter of Chu, ___NY2d___ [decided October 13, 1977]).

Cross motion granted only to the extent of recalling and vacating the order of reference of October 7, 1977 and in all other respects, motion denied.

GULOTTA, P.J., HOPKINS, LATHAM, COHALAN and MARGETT, JJ., concur.

December 8, 1977 IN RE PELTZ, PHILLIP

Nos. 5765
5843

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

- x

In the Matter of PHILIP PELTZ
an attorney and counselor at law:

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Petitioner,

PHILIP PELTZ,

Respondent.

- x

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT:

The undersigned respectfully submits his report in the disciplinary proceeding against Philip Peltz, an attorney.

BACKGROUND INFORMATION

On October 29, 1976 I was appointed referee by this Court to hear and report and

make findings on the issues raised by said petition and answer.

Accordingly, I held a hearing on January 12, 1977; testimony was taken, exhibits received in evidence and thereafter briefs of the respective parties were received.

CONTENTIONS OF PARTIES AND PROOF OFFERED TO SUPPORT CONTENTIONS

The petition alleges that by order of this Court dated April 28, 1975, the Joint Bar Association Grievance Committee was authorized to institute this disciplinary proceeding based on alleged acts of professional misconduct by Philip Peltz.

The respondent was admitted to practice as an attorney in this Department on June 13, 1958.

On the 9th day of January 1970 he was convicted in the United States District

Court by a jury of the United States District Court for the Southern District of New York as follows:

> "IT IS ADJUDGED that the defendant upon his plea of not guilty, and a finding of guilty by a jury has been convicted of the offense of unlawfully, wilfully and knowingly using means of interstate commerce and of the mails and the New York Stock Exchange in employing a device, scheme and artifice to defraud and making untrue statements of materials facts in connection with the sale of certain common stock. (Counts 3 and 4) (Title 15, United States Code, Sections 78j(b) and 78ff(a) and Title 18, United States Code, Section 2); unlawfully, wilfully and knowingly using means of interstate commerce, of the mails and the New York Stock Exchange to effect short sales of certain securities in contravention of Securities Exchange Commission regulations. (Count 5) (Title 15, United States Code, Sections 78j(a) and 78ff(a) and Title 18, United States Code, Section 2); conspiracy so to do. (Count 1) (Title 18, United States Code, Section 371)"

He was sentenced to a one-year

sentence -- to serve three months in a jail-type institution for a period of three months, the remainder of the sentence to be suspended.

The defendant in response in his pleading, and in the course of the hearing, admits the conviction as above described but denies that his conduct involves moral turpitude to such a degree that he should not, in the light of all the mitigating circumstances, be permitted to continue in the practice of the law.

It is to be noted that the order of this court, dated October 29, 1976, referring this matter to be was based on a petition dated July 9, 1976. The conviction took place on January 9, 1970. This delay in respondent's hearing is not due to the dereliction of the Grievance Committee. Apparently, the entire matter lay dormant until the Grievance

Committee of the Bar Association of the City of New York received a letter dated February 1975, which it forwarded to petitioner, from Mr. Murray Wiener inquiring why Mr. Peltz, the respondent, was not subjected to a disciplinary hearing. Mr. Murray Wiener, subsequent to the conviction of the respondent, was convicted of perjury. Mr. Wiener was the inside informant employed by the S.E.C. who illegally gave the respondent inside information. As a result of the cooperation of the respondent, Mr. Wiener was convicted of perjury. (See respondent's exhibit "C", a letter from the United States Attorney reflecting the cooperation of the respondent in connection with the conviction of Mr. Wiener.)

I have held up this report at the request of the attorney for the respondent to give him an opportunity to investigate whether

there had been a previous disposition of the matter by the Association of the Bar of the City of New York. Since at this time I have no definitive information in that regard, I have decided to submit my report.

The petitioner offered the minutes of respondent's trial consisting of some 538 pages which I read carefully.

The respondent admits his guilt--does not seek to re-litigate trial but offers in his defense mitigating proof. The petitioner in its brief has stated that the respondent 'has admitted his prior weakness of character * * *". The petitioner candidly states in the brief submitted to me that there has been a change of character in the respondent and that the petitioner is led to believe that such change has been resolved in a manner most beneficial to the respondent and that the

respondent has profited from his past experiences.

The respondent admits his guilt--admits that he refused to cooperate with the U.S. Attorney until after his conviction and during his stay in jail. His failure to cooperate was due to a sense of loyalty to his first client, Mr. Katz, who inspired him to commit the acts that resulted in his conviction. Mr. Katz suggested to him that he contact Mr. Wiener of the S.E.C. who would give him the inside information that the Georgia Pacific was under investigation and that the market price of the stock would plummet downward; after receiving such information, he contacted several brokers advising them that he owned stock, that he wished to sell and that he would in several days deliver the stock (which he did not own); the stock did

not go down immediately. He would contact Mr. Wiener, the S.E.C. employee, who would advise him as to the status of the stock. In the meantime, the respondent would hold off the delivery of the stock which, of course, he did not possess and which he intended to buy at a lower price. Finally, when the price of the stock went down, he purchased the stock at the lower price, with money that he borrowed from a factor. He then delivered the stock to the brokers, who in turn paid the higher price, and he thus made a substantial profit.

In essence, the offense, as admitted by the respondent, consisted of selling stock short contrary to the regulations, making representations that he owned stock he did not own, unlawfully influencing an employee of the S.E.C. by acquiring inside information

from such employee of an investigation of a company which, when published, would cause the stock to decline.

The respondent testified that none of the counts upon which he was convicted involved bribery. The count of bribery in the report was dismissed.

The respondent testified that his relationship with his clients prior to and after his conviction was excellent; that he was never confronted with any grievance procedure.

Defendant in his testimony candidly engages in a narrative of self-condemnation of his culpable conduct which led to the aforesaid conviction. He relates that a symbol of status to him was owning automobiles, belonging to clubs, aspiring to acquire wealth and to keep up with the status of some of his pseudo-friends. His emotional difficulties

were further compounded by a difficult marriage, which ended in divorce, and a sick child in his custody who within a short time died. He admits he made a serious error in not cooperating during the course of trial in exposing Mr. Murray Wiener and his former client Mr. Katz. He further admits that his false sense of loyalty was misguided, especially since the authorities offered to give him reasonable consideration for such cooperation.

He asserted during the three months' period that he served in prison, he decided that his values and attitudes toward acquiring wealth were wrong; that it was more important to be a decent human being and that the most important achievement in life is to have the respect of community, help those in need and conduct an honorable life.

He then proceeded to cooperate with the United States Attorney's Office, testified on behalf of the government and this ultimately resulted in the conviction of Mr. Wiener for the crime of perjury committed. This statement is supported by the letter from the U.S. Attorney then in charge of the prosecution.

The respondent further offers in mitigation of the offense committed by him his sincere and successful reevaluation of himself. To support this contention he has submitted himself to psychiatric care of Dr. Isidore Frimmer, M.D. F.A.P.A. The doctor's report supports his contention that he has made a successful reevaluation of himself.

He supports his contention that he possesses all the attributes associated with

being an honorable person and deserving to remain a member of an honorable profession, by submitting proof that he is associated with Temple Sinai and notwithstanding the knowledge of the Rabbi and the officers of the Temple of his past dereliction, he is about to become president of said Temple. The testimony of the Rabbi of the Temple states that his conduct is exemplary, excellent; he is dedicated to his family and unselfish in his contributions to many related charities.

An array of witnesses have testified -- judges and justices of the Civil and Supreme Courts, lawyers and laymen who speak of him in the highest terms as to his reputation, integrity, dedication to the legal profession. One of the Justices of the Supreme Court and a former District Attorney of Bronx County, who knew him prior to his conviction of the

crime for which he was convicted, states that the respondent has comported himself in a professional and exemplary fashion. Since the justice ascended the bench, he has observed the respondent and found him to act in a lawyer-like manner and find "him to be much more of a reflective, introspective person that he was before the experience of 1969".

Respondent testified that he has engaged in a heavy load of 18B cases and is also on the panel of the U.S. District Court Panel of Indigent Defendants.

MITIGATING CIRCUMSTANCES AND FINDINGS OF FACT

In view of the admitted conviction of respondent, the hearing was confined solely to testimony dealing with possible mitigating circumstances to be considered by the

Appellate Division in the discharge of its difficult and delicate responsibility of determining what sanction, if any, be appropriate. (Matter of Levy, Court of Appeals, N. Y. L. J. 7/16/75.)

I make the following findings:

1. I find that the defendant was convicted of the crime more fully set forth above.

2. I find that prior to such conviction and after such conviction, that with respect to his clients, he has conducted himself consistent with high professional standards and has never been convicted of any other crime nor been involved in any prior disciplinary proceeding.

3. I find that he is a completely rehabilitated person, fully conscious of his social and professional responsibilities.

4. I find that in the practice of

Criminal law he has undertaken the defense, for little or no compensation, of the underdog and the poor, to a considerable extent.

5. I find that he has overcome his emotional problems, that money to him is no longer a badge of honor, that his family life and reputation in the community is excellent.

6. I further find that he is presently fit to continue the responsibilities incident to the practice of law.

CONCLUSIONS

As indicated, the charge against the respondent is fully sustained. I have also given consideration and make findings with respect to the mitigating circumstances aforestated.

Respectfully submitted,

/s/ Simon J. Liebowitz

Simon J. Liebowitz
Referee to Hear and Report

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

- - - - - - - - - - - - - - - - - X

In the Matter of Philip Peltz, an attorney and counselor at law:

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Petitioner,

PHILIP PELTZ,

Respondent.

PETITION

- - - - - - - - - - - - - - - - - X

TO THE HONORABLE, PRESIDING JUSTICE AND ALL JUSTICES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT:

The petition of the Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts respectfully

alleges that:

FIRST: By order of this Court, dated and filed April 28, 1975, the Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts was authorized to institute and prosecute a disciplinary proceeding against Philip Peltz, based on the acts of professional misconduct set forth in the certified copy of a Judgment of the United States District Court, Southern District of New York and filed in this court on April 14, 1975, and on any other charges of professional misconduct by said attorney which may come to said Committee's attention. Further, said order of April 28, 1975 appointed Nicholas C. Cooper, Esq. as attorney for the petitioner in such proceeding.

SECOND: Said order of April 28, 1975 was duly made and filed by this Court

pursuant to the authorization of Section 90 of the Judiciary Law and pursuant to Section 691 of the Rules Governing the Conduct of Attorneys of this court.

THIRD: The respondent, Philip Peltz, was admitted to practice as an attorney and counselor at law in the courts of the State of New York by the Appellate Division of the State Supreme Court, Second Judicial Department, on June 18, 1958.

FOURTH: Upon information and belief at all times hereinafter mentioned, respondent practiced law as a private practitioner in the County of Kings, State of New York.

FIFTH: Upon information and belief, respondent, Philip Peltz, has been guilty of illegal, corrupt, and unethical practices and of professional misconduct and conduct

prejudicial to the administration of justice as an attorney and counselor at law in that:

A. On April 7, 1969 an indictment, no. 69 CR 312, was filed in the United States District Court in the Southern District of New York charging the respondent with various violations of Titles 15 and 18 of the United States Code and regulations of the Securities Exchange Commission. On December 1, 1969 the respondent was found guilty by a jury of the following counts of said indictment:

COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of January, 1966 up to and including the date of the filing of this indictment, in the Southern District of New York, PHILIP PELTZ, the defendant, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree with other persons including an employee of the United States and the Securities and Exchange Commission, to defraud the United States and an agency thereof, to wit, the Securities

and Exchange Commission of and concerning their rights to have their business conducted impartially and according to law and to have the securities laws of the United States administered impartially and according to their terms.

2. It was a part of such conspiracy that PHILIP PELTZ, the defendant, would directly and indirectly obtain from employees of the United States and Securities and Exchange Commission confidential inside information about matters under consideration by the Securities and Exchange Commission and its staff including action concerning the Georgia Pacific Corporation, and would use such information for private profit.

OVERT ACTS

In pursuant of said conspiracy and to effect the objects thereof, the following overt acts, among others were committed in the Southern District of New York:

1. On or about April 7, 11 and 12, 1966, the defendant, PHILIP PELTZ, caused sales of shares of Georgia Pacific stock.

2. During the period from January 1, 1966 to June 1, 1966, the defendant, PHILIP PELTZ, had conversations with female persons respecting contacts such

persons were to have with co-conspirators of defendant.

3. During the period from January 1, 1966 to June 1, 1966, the defendant, PHILIP PELTZ, had conversations with an employee of the United States and the Securities and Exchange Commission.

4. On or about April 15, 1966, the defendant PHILIP PELTZ, made a telephone call from New York, New York, to Silver Spring, Maryland.

(Title 18, United States Code, Section 371.)

COUNT THREE

The Grand Jury further charges:

On or about April 7, 1966, in the Southern District of New York, PHILIP PELTZ, the defendant, unlawfully, wilfully and knowingly, directly and indirectly, made use of means or instrumentalities of interstate commerce and of the mails and of a national securities exchange, to wit, the New York Stock Exchange, to use and employ in connection with the sale of common stock of Georgia Pacific Corporation, a security registered on the said national securities exchange, a manipulative and deceptive device and contrivance in contravention of rules and regulations prescribed

by the Securities and Exchange Commission [Rule 10b-5 (17 CFR Section 240.10a-1)] as necessary and appropriate in the public interest and for the protection of investors, in that the said defendant in placing an order with the brokerage firm of Carl M. Loeb Rhoades & Co. for the sale of 2,000 shares of said Georgia Pacific Corporation common stock on said Exchange did falsely inform said brokerage firm that he and his mother owned said stock and that the sale was "long", and did omit to inform said brokerage firm that he and his mother did not own said stock and that the sale was "short" and thereby employed a device, scheme and artifice to defraud and made an untrue statement of a material fact, omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in an act, practice and course of business which did and would operate as a fraud and deceit.

(Title 15, United States Code, Sections 78j(b) and 78ff(a); Title 18, United States Code, Section 2.)

COUNT FOUR

The Grand Jury further charges:

On or about April 7, 1966, in the Southern District of New York, PHILIP PELTZ, the defendant, unlawfully, wilfully and knowingly, directly and indirectly, made use of means or instrumentalities of interstate commerce and of the mails and of a national securities exchange, to wit, the New York Stock Exchange, to use and employ in connection with the sale of common stock of Georgia Pacific Corporation, a security registered on the said national securities exchange, a manipulative and deceptive device and contrivance in contravention of rules and regulations prescribed by the Securities and Exchange Commission [Rule 10b-5 (17 CFR Section 240.10a-1)] as necessary and appropriate in the public interest and for the protection of investors, in that the said defendant, in placing an order with the brokerage firm of Bache & Co. for the sale of 1,000 shares of said Georgia Pacific Corporation common stock on said Exchange did falsely inform said brokerage firm that he owned said stock, that the shares were registered in his name and that the sale was "long", and did omit to inform said brokerage firm that he did not own any shares of said stock, and that the sale was "short", and thereby employed a device, scheme and artifice to defraud and made

an untrue statement of a material fact, omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in an act, practice and course of business which did and would operate as a fraud and deceit.
(Title 15, United States Code, Section 78j(b) and 78ff(a); Title 18, United States Code, Section 2.)

COUNT FIVE

The Grand Jury further charges:

On or about April 7, 1966 in the Southern District of New York, PHILIP PELTZ, the defendant, unlawfully, wilfully and knowingly, directly and indirectly, made use of means or instrumentalities of interstate commerce and of the mails and the facilities of a national securities exchange, to wit, the New York Stock Exchange, to effect short sales of 3,000 shares of common stock of Georgia Pacific Corporation, a security registered on the said national securities exchange, in contravention of rules and regulations prescribed by the Securities and Exchange Commission [Rule 10a-1 (17 CFR Section 240.10a-1)], as necessary and appropriate in the public interest and for the protection of investors,

in that the said defendant, for his own account and for the account of other persons, effected and caused to be effected on the said New York Stock Exchange short sales of the securities hereinabove referred to st the price at which the last sale thereof, regular way, was effected on the New York Stock Exchange when such price was not above the next preceding different price at which a sale of such security, regular way, was effected on such exchange and below the price at which the last sale thereof, regular way, was effected on such exchange. (Title 15, United States Code, Section 78j(a) and 78ff(a); Title 18, United States Code, Section 2.)

B. On January 9, 1970, the respondent was convicted of (a) unlawfully, willfully and knowingly using means of interstate commerce and the mails and the New York Stock Exchange, in employing a device, scheme and artifice to defraud and making untrue statements of material facts in connection with the sale of certain common stocks (counts 3 and 4 [U.S. Code, Title 15, Section 78j(b),

Title 18, 78ff(a); Title 18, Section 21 (sic)]); (b) unlawfully, wilfully and knowingly using means of interstate commerce, of the mails and the New York Stock Exchange to effect short sales of certain securities in contravention of Securities Exchange Commission Regulations (count 5 [U.S. Code, Title 15, Section 78j(a), 78ff(a); Title 18, Section 21 (sic)]) and (c) conspiring so to do (count 1 [U.S. Code, Title 18, Section 371]). The respondent was sentenced to concurrent terms of one year on each of the counts 1, 3, 4 and 5; three months of which were to be served in a jail-type institution with the remainder of the sentence to be suspended, provided that a one year probation period would commence upon the expiration of confinement.

C. The crimes of which the respondent was convicted are "serious", within the

meaning of Section 691.7 of the Rules Governing the Conduct of Attorneys of the Appellate Division, Second Judicial Department, are willful and involve moral turpitude.

SIXTH: Respondent, Philip Peltz, knew or should have known in committing the acts aforesaid, that he was violating the applicable statutes of the United States; the Canons of Professional Ethics of the New York State Bar Association adopted January, 1909, as amended; the Rules Governing the Conduct of Attorneys of the Appellate Division, Second Judicial Department, and his inherent duty as an attorney and counselor at law.

SEVENTH: The sources of petitioner's knowledge and the grounds of his belief are the facts in evidence in a matter before the United States District Court for the Southern District of New York, entitled,

"United States of America vs. Philip Peltz (69 CR 312)."

WHEREFORE petitioner prays that an order be issued directing that the respondent, Philip Peltz, as an attorney and counselor at law, be disciplined upon the charges set forth herein, and for such other action as may be contemplated by Section 90 of the Judiciary Law of the State of New York, in accordance with the practice directed to be observed in the disposition of such matters by the Courts of this State.

Dated: Brooklyn, New York
July 9, 1976

/s/ A. Paul Goldblum
A. PAUL GOLDBLUM

77-1437

Supreme Court, U. S.
FILED
MAY 10 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977
No.

PHILIP PELTZ,

Petitioner,

v.

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

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Brooklyn, New York 11241
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977
No.

PHILIP PELTZ,

Petitioner,

v.

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

PRELIMINARY STATEMENT

The within brief is submitted in opposition to the petition for a Writ of Certiorari to review the order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, entered on December 8, 1977, which struck petitioner's name from the roll of attorneys of the State of New York.

STATEMENT OF THE CASE

On January 9, 1970, in the United

States District Court for the Southern District of New York, petitioner was convicted of unlawfully, willfully and knowingly using means of interstate commerce and the mails and the New York Stock Exchange, in employing a device, scheme and artifice to defraud and making untrue statements of material facts in connection with the sale of certain common stocks (counts 3 and 4) in violation of U.S. Code, Title 15, Sections 78j(b) and 78ff(a) and Title 18, Section 2; unlawfully, willfully and knowingly using means of interstate commerce, of the mails and the New York Stock Exchange to effect short sales of certain securities in contravention of Securities Exchange Commission regulations (count 5) in violation of U.S. Code, Title 15, Section 78j(a) and 78ff(a) and Title 18, Section 2 and conspiracy so to defraud the United States (count one) U.S. Code, Title 18, Section

371. The petitioner was sentenced on January 9, 1970, to concurrent terms of one year on each of the counts 1, 3, 4 and 5; three months of which were to be served in a jail-type institution with the remainder of the sentence to be suspended, provided that a one year probation period would commence upon the expiration of confinement.

Petitioner's judgment of conviction was subsequently affirmed by the United States Circuit Court of Appeals for the Second Circuit (433 F.2d 48); certiorari was denied by this Court on March 8, 1971 (401 U.S. 955).

Respondent Committee's[1] first notice of respondent's 1970 conviction came

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[1]The respondent Committee only came into existence in November, 1974, with the promulgation of Part 691 of the Rules of the Appellate Division, Second Judicial Department.

in February, 1975, with the receipt of a letter from petitioner's co-defendant, Murray Weiner, addressed to the Appellate Division, First Department, which letter was forwarded by the Committee on Grievances of the Association of the Bar of the City of New York.[2] The respondent Committee then promptly reported the conviction to the Appellate Division, which in April, 1975, based upon then existing law, authorized respondent to institute a proceeding based upon petitioner's conviction. Knowing that the transcript and exhibits of petitioner's Federal trial would be

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[2]The Association of the Bar learned of petitioner's conviction in May, 1972, from Assistant United States Attorney David Brodsky--petitioner, who then maintained a law office in Bronx County was, of course, convicted in Manhattan. The Association of the Bar, which, it would seem, intended to withhold action pending petitioner's testimony in the Fall, 1972 trial of Murray Weiner, apparently lost track of the matter until receipt of Weiner's 1975 letter.

needed as evidence in the disciplinary proceeding, respondent attempted to obtain same from the United States Attorney's office. Much difficulty was encountered; the Assistant United States Attorney familiar with the case had left the office, the United States Attorney had moved to new quarters at St. Andrews Plaza, the files relating to petitioner's case had been placed in storage and took literally months to locate.

As a result, petitioner's petition was not served until July, 1976. Petitioner filed an answer thereto and the Appellate Division, by order dated September 17, 1976, referred the issues raised by the disciplinary petition and the answer to the Hon. Arthur S. Hirsch. Thereafter, by a further order, dated October 20, 1976, Hon. Arthur S. Hirsch was relieved of such designation and the said issues were referred to the Hon. Simon J.

Liebowitz, a Retired Justice of the Supreme Court, as Referee, to hear and to report, together with his findings on the said issues. The Hon. Simon J. Liebowitz held a hearing and filed his report with the Appellate Division on July 1, 1977, together with a transcript of the hearing and the exhibits. The respondent moved, by a notice of motion dated July 11, 1977, to confirm the said Referee's report, and the petitioner submitted an affirmation in support of the respondent's said motion. The Appellate Division held the said motion in abeyance and the respondent moved by a notice of motion dated August 26, 1977, for leave to serve and file a supplemental petition therein, and to refer the issues raised by the supplemental petition to a referee to hear and to report thereon. The Appellate Division, by an order dated September 9, 1977, granted the said motion insofar as it was for leave to

serve and file the supplemental petition, and upon the service and filing of the petitioner's answer, the Court on October 7, 1977, referred the matter to Hon. Harry Gittleson, a retired Justice of the Supreme Court, to hear and to report, with his findings upon each of the issues raised by the supplemental petition and answer.

On October 13, 1977, the New York Court of Appeals rendered a decision in Matter of Chu, 42 NY2d 490, a case concerning an attorney convicted of a Federal felony. The Court of Appeals held, among other things, that:

> "We conclude that conviction of an attorney for criminal conduct judged by the Congress to be of such seriousness and so offensive to the community as to merit punishment as a felony is sufficient ground to invoke automatic disbarment."

By notice of motion dated October 20, 1977, the respondent moved in the Ap-

pellate Division to vacate the order of October 7, 1977 (referring the issues raised by the supplemental petition and answer), and to strike petitioner's name from the roll of attorneys based upon the grounds that petitioner was automatically disbarred based upon a felony conviction.[3] As above noted, on December 8, 1977, the Appellate Division granted said motion and struck petitioner's name from the roll of attorneys (Matter of Peltz, 60 AD2d 587). Petitioner filed his notice of appeal dated December 15, 1977, and alternatively sought leave to appeal to the Court of Appeals from said order and on January 18, 1978, the Court of Appeals dismissed the appeal and denied leave (supra, 43 NY2d 646, 844).

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[3]Petitioner's crimes were felonies under Federal Law, although not cognizable as such under New York law.

POINT ONE

RETROSPECTIVE APPLICATION OF THE NEW YORK COURT OF APPEALS' DECISION IN MATTER OF CHU, 42 NY2d 490, DOES NOT CONSTITUTE AN EX POST FACTO LAW AND BILL OF ATTAINER

New York Judiciary Law Section 90, subdivision 4, provides as follows:

> "4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.
>
> Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys."

Prior to March 5, 1940, an attorney was deemed disbarred and his name was stricken from the roll of attorneys upon conviction of any crime statutorily defined as a felony under the laws of New York, a sister State or of the United States pur-

suant to the then Judiciary Law, Section 88, subdivision 3 (renumbered Judiciary Law, Section 90, subdivision 4 [1945]).

On March 5, 1940, the New York Court of Appeals in Matter of Donegan (283 N.Y. 285) qualified the automatic disbarment statute to the following extent:

> "Strict construction of section 88, subdivision 3 and section 477 of the Judiciary Law requires that the term 'felony' include only those Federal felonies which are also felonies under the laws of this State, and exclude such Federal felonies as are 'cognizable by our laws as a misdemeanor or not at all'"(supra at 292).

On October 13, 1977, the New York Court of Appeals modified the Donegan ruling in Matter of Chu, stating, in part, that:

> "We conclude that conviction of an attorney for criminal conduct judged by the Congress to be of such seriousness and so offensive to the community as to merit punishment as a felony is sufficient ground to invoke automatic disbarment. Whatever may have been

> the proper evaluation of a felony conviction in courts other than those of our own State in 1940 when Donegan was decided, we now perceive little or no reason for distinguishing between conviction of a federal felony and conviction of a New York State felony as a predicate for professional discipline (supra at 493).

Since the disciplinary proceeding predicated upon petitioner's conviction was not finally judicated at the time of the Court of Appeals decision in Chu, that ruling was held to apply to petitioner and his name was stricken from the roll of attorneys.

Petitioner's contention, that the application of the Chu ruling to him constitutes an ex post facto law and bill of attainer, is wholly without merit.

An ex post facto law has been defined as one:

> "which imposes a punishment for an act which was not punishable when it was committed, or imposes additional punishment, or changes the rules of evidence, by which less or different testimony is sufficient to convict." (C.J.S. Constitutional Law §435 et seq.)

Further, the constitutional limitation as to ex post facto laws has long been held by this Court to apply solely to criminal statutes (Baltimore & S.R. Co. v. Nesbit, 51 U.S. 395, see also, Mahler v. Eby, 264 U.S. 32) and for this reason, petitioner's reliance on Bouie v. City of Columbia (378 U.S. 347) is unfounded.[4] The Supreme Court's decision in the Bouie case was based upon a determination that "if a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which

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[4]Disciplinary proceedings have consistently been held to be civil in nature (Matter of Zuckerman, 20 NY2d 430, 438 [1967]), cert. den. 390 U.S. 925 [1968], and are not considered to be criminal (Matter of Unger, 27 AD2d 925 [1st Dept. mem. 1967], cert den. 389 U.S. 1007 [1967]).

had been expressed prior to the conduct in issue,' it must not be given retroactive effect" (supra at 354). The case at bar is neither a criminal one nor was the decision in Chu either "unexpected" or "indefensible." Judiciary Law, Section 90, has not changed, only the interpretation thereof vis a vis Matter of Donegan (supra) has changed, and for this reason petitioner's reliance on Matter of Garland (71 U.S. 333) is unfounded.

Moreover, petitioner's reliance on Matter of Ruffalo (390 U.S. 544) is clearly misplaced.[5] No new charges were lodged against petitioner as a result of the Chu decision; in fact, the net effect of Chu was that petitioner was not the subject of

[5]It should be noted that despite the reversal of Ruffalo's disbarment in the Federal Court, his State Court disbarment, which was the predicate for the Federal proceeding, was unaffected by the Supreme Court's decision (supra at 552).

any professional misconduct charge, but rather ceased to be an attorney by operation of law; the notice requirements of Ruffalo obviously do not apply.

Petitioner's argument that the Chu ruling should not be applied retroactively in petitioner's case further ignores the fact that it has long been the law that new or revised principles of decisional law apply to all cases not finally adjudicated and in which litigation is pending (People v. Morales, 37 NY2d 262). In the Morales case, the New York Court of Appeals, relying upon authority of this Court, discussed the common-law concept of retroactivity as follows:

> "The concept of 'retroactivity' is not new. It has an ancient tradition, under which Judges were not deemed to 'make law' as such, but to 'pronounce the law' which, even if it had previously been enunciated erroneously, was conceived of as having always been there, waiting just to be correctly stated. (Mishkin, The High Court, the Great

> Writ, and the Due Process of Time and Law, 79 Harv L Rev 56, 58.) Consequently, since the 'correct' law was looked upon as having always been the same, a case decided on direct appeal always received the benefit, or detriment, of any decisional law 'pronounced' before its judgment became final. (See United States v. Schooner Peggy, 1 Cranch [5 U.S.] 103, 110.) However, once a judgment had become final, it was not affected by law freshly 'pronounced' thereafter. (1 Blackstone's Commentaries 69 [15th ed.]; 1 Black, Judgments [2d ed.], §§245, 246.)" (Supra at p. 268.)

Similarly, rulings of this Court in Mullany v. Wilbur, 421 U.S. 684 (see People v. Davis, 49 AD2d 437) and Morrissey v. Brewer, 408 U.S. 471 (see People Ex Rel Gambino v. Warden, 43 AD2d 400) have been applied retroactively.

Indeed the law with respect to retroactivity is as stated by this Court in Linkletter v. Walker, 381 U.S. 618, that, "Under our cases it appears (1) that a change in law will be given effect while a case is on direct review, Schooner Peggy,

supra..." and "...no distinction (is) drawn between civil and criminal litigation..." (supra at 627).

POINT TWO

DELAY IN THE COMMENCEMENT OF DISCIPLINARY PROCEEDINGS AGAINST PETITIONER DOES NOT CONSTITUTE A VIOLATION OF PROCEDURAL DUE PROCESS

The constitutional right to a "speedy trial" applies only to criminal cases and then comes into play only after a person has been accused of a crime, i.e., when an indictment is returned (United States v. Marion, 404 U.S. 307).

As recently as April 5, 1977, the New York Court of Appeals confirmed the civil nature of these proceedings:

> "Disciplinary proceedings against an attorney for professional misconduct have consistently been held not to be criminal proceedings but rather are those which serve to protect the court and society from the practice of law by persons who fail to maintain the

necessary standards of integrity and probity." (Matter of Anonymous Attorneys, 41 NY2d 506, 509.)

The Court of Appeals in Anonymous further reaffirmed the words of Judge Cardozo that:

> "Membership in the bar is a privilege burdened with conditions.... To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime" (Matter of Rouss, 221 N.Y. 81, 84-5).

Petitioner argues that the lapse of several years between the date of his conviction and the institution of disciplinary proceedings predicated thereon constitutes a denial of a "speedy trial." As noted above and as found by the Appellate Division's referee, the delay "is not due to dereliction of the Grievance Committee," thus resulting in the rejection of petitioner's "laches" argument in the Courts below.[6]

[6]The essential element of the equitable defense of laches is delay prejudicial to the opposing party (In re Barabash's Estate, 31 NY2d 76, 81), and the doctrine of laches will not apply unless the delay has occasioned some prejudice (Matter of Huey, 42 AD2d 1028, 1029). Petitioner was not prejudiced by the delay in the institution of the disciplinary proceeding; he continued to practice law unfettered by his criminal conviction.

The defendant in Marion contended that his right to a "speedy trial" was violated because of the lapse of three years between the end of the criminal scheme and the return of the indictment; as here, the filing of charges. Even assuming, arguendo, that the speedy trial right was relevant to attorney disciplinary proceedings--which it is not--that right affords no protection to one who is not yet an accused:

> "On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any

> particular period of time. The Amendment would appear to guarantee to a criminal defendant that the Government will move with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him. [T]he essential ingredient is orderly expedition and not mere speed." (Supra at 313.)

Moreover, the Supreme Court, holding in Marion that the trial court dismissed the indictment on "speedy trial" grounds in error, noted "No opinions of this Court intimate support for appellees' thesis, and the courts of appeals that have considered the question in constitutional terms have never reversed a conviction or dismissed an indictment solely on the basis of the Sixth Amendment's speedy trial provision, where only pre-indictment delay was involved" (emphasis added, supra at 315).

The New York Courts have further recognized that there is no statute of limitations preventing the Appellate Division

from taking cognizance of the unprofessional conduct of an attorney (In re Phillies, 17 AD2d 93, 100, lv. to app. den. 12 NY2d 645).

Lastly, petitioner himself is at least in part to blame for that fact that he fell within the ambit of the Chu decision. Subsequent to the receipt of the referee's report in July, 1977, the respondent Committee promptly moved to confirm same and had it not been for petitioner's "activities" in August, 1977--"activities" which the Appellate Division found to warrant filing of a supplemental petition and necessitating further hearings--petitioner's matter presumably would have been finally adjudicated and not subject to the Chu decision.

Although, by reason of the intervening decision in Chu, the Appellate Division never determined the merits of peti-

tioner's August, 1977 "activities," suffice it to say, petitioner is himself responsible, at least in part for his present predicament vis a vis Matter of Chu.

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Dated: Brooklyn, N.Y.
May 9, 1978

Respectfully submitted,

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